No. 83-128

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents contend that they were kept in administrative detention not for security reasons but because they were suspects in a criminal investigation of prison murders.[1] But as we explained in our petition (at 15-17), the whole point of administrative detention pending a criminal investigation is to preserve the security of the institution and the safety of those within it, particularly potential witnesses who may be subject to intimidation and subornation of perjury. Moreover, in order to place and retain an inmate in administrative detention pending a criminal investi-

[1] See, *e.g.*, Mills & Pierce Br. in Opp. 10-11, 16; Ramirez Br. in Opp. 6.

gation, prison officials must find that the inmate's continued presence in the general prison population "poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." 28 C.F.R. 541.20(a) and (c). Contrary to respondents' suggestion, administrative detention pending a criminal investigation is not intended to serve some sort of symbolic "accusatory" purpose.[2] Rather, security considerations constitute the heart of the rationale for administrative detention in this and similar cases.

2. Contrary to respondents' contentions, the holding of the court below that they had a constitutional right to counsel during part of the period they were in administrative detention prior to their indictment and arraignment is in no way a "natural extension"[3] of this Court's right to counsel decisions. Respondents cite language from *United States* v. *Ash*, 413 U.S. 300 (1973), and *United States* v. *Wade*, 388 U.S. 218 (1967), to support the decision of the court below, suggesting that a right to counsel arises whenever it is necessary to a "meaningful defense," or at

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[2] Respondents Segura and Ramirez appear to believe they were segregated from the general prison population for disciplinary reasons. Segura Br. in Opp. 8; Ramirez Br. in Opp. 5. If that were so, it would not affect the conclusion that they were not entitled to appointment of counsel. See Pet. 18 n.14. We note that, in any event, to the extent the record addresses the reasons for respondents' detention, it appears that it was not a disciplinary measure but was for administrative purposes (*i.e.*, because of pending investigations and the associated security concerns). The only disciplinary measure appears to have been loss of good time credits. See Pet. 3-4 n.3, 6 n.5, 8.

[3] Segura Br. in Opp. 5.

any "critical stage" of a prosecution.[4] But the Court in *Ash* and *Wade* was speaking of a right to counsel in the period *following* the initiation of adversary judicial proceedings. The Court has repeatedly made clear, based on analysis of the language of the Sixth Amendment and the purposes it was intended to serve, that the right to counsel does not arise prior to formal initiation of adversary judicial proceedings. See *Estelle* v. *Smith*, 451 U.S. 454, 469-470 (1981); *Moore* v. *Illinois*, 434 U.S. 220, 226-227 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion).[5] The Court has not confined this proposition to the facts of the cases before it; nor has it given any indication that the constitutional right to counsel somehow expands in a prison setting.[6] As we showed

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[4] See, *e.g.*, Mills & Pierce Br. in Opp. 12-15.

[5] Several respondents suggest that this Court's decisions in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), indicate that a Sixth Amendment right to counsel may arise prior to the formal initiation of adversary judicial proceedings. See, *e.g.*, Segura Br. in Opp. 10; Ramirez Br. in Opp. 5, 7. In those cases the Court indicated that a suspect subjected to custodial interrogation would be entitled to have counsel present during that interrogation. But the Court has made clear that *Escobedo* and *Miranda* are properly viewed as grounded on the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, not on the Sixth Amendment right to counsel. See *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4 (1980); *Kirby* v. *Illinois*, 406 U.S. at 688, 689; *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966).

[6] Respondents note (as did the court below, Pet. App. 12a-13a) that a suspect outside prison who is arrested and detained must appear before a magistrate without unnecessary delay and that such a suspect would be guaranteed the assist-

in our petition (at 17-22), the decision of the court below represents a sharp deviation from this Court's right to counsel decisions. Respondents have not refuted that showing.[7]

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ance of counsel at the time of that appearance. See, *e.g.*, Mills & Pierce Br. in Opp. 15-16. But it is not the arrest itself that triggers the Sixth Amendment right to counsel. Rather, that right is triggered by the filing of formal criminal charges that is necessary if authorities are to continue to hold a suspect, *i.e.*, by the holding to answer a criminal charge. See Pet. 19 & n.15. Respondents' analogy fails, because until such formal charges are brought against an inmate-suspect, no right to counsel attaches.

Respondent Segura (Br. in Opp. 7) cites *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), for the proposition that rules applicable outside a prison cannot always be applied to the prison setting. But the point in *Wolff* was that constitutional rights may be *more limited* in the prison setting. The conclusion of the court below that the right to counsel is *broader* in the prison setting than in the non-prison setting stands *Wolff* on its head.

[7] Respondents Mills and Pierce also suggest (Br. in Opp. 18-20) that their position is supported by various court of appeals' decisions. But even respondents' own account of the decisions suggests that, if anything, they support the position of petitioner and demonstrate that the decision of the court below is truly unprecedented.

Respondents Mills and Pierce particularly emphasize *United States* v. *Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952 (1976). But the court in *Duke* held that administrative segregation did not trigger the Sixth Amendment right to a speedy trial, noting that such segregation does not constitute an arrest and is not inherently dependent on or related to federal prosecution (*i.e.*, it is not instigated by prosecutors), but rather is an internal means of classifying prisoners under the almost total discretion of prison officials. Those observations are fully applicable here. See Pet. 19-20. See also *United States* v. *Daniels*, 698 F.2d 221, 223 (4th Cir. 1983), in which the court held that a suspect's placement in segregation pend-

3. a. Respondents place considerable emphasis on their claims that their administrative detention during the period prior to the time they were indicted interfered with their ability to prepare a defense and thus allegedly deprived them of a fair trial. In particular, respondents claim that they were prejudiced by delay in their opportunity to prepare a defense, allegedly resulting in loss of potential witnesses, and by a "lack of parity" in the trial preparation of respondents and the government.[4] But such contentions do not somehow mandate the conclusion that respondents must have been deprived of a constitutional right to counsel. As we noted in our petition (at 21-22), respondents' claims concerning their ability to prepare for trial are at most subjects for a due process analysis.

b. Respondents further assert that our second question presented, which concerns the court of appeals' treatment of the issue of prejudice, entails only a fact-specific issue unsuited to consideration by this Court. They misperceive the thrust of our contention. Our point is that, assuming arguendo respondents were deprived of a constitutional right to counsel because of their administrative detention in the preindictment period, the court below did not engage in the necessary analysis of whether the alleged deprivation resulted in specific prejudice to respondents. Rather, it rested its conclusion on either a presumption of prejudice or a *pretrial* finding that the ability of respondents Mills and Pierce to prepare for trial had been

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ing an FBI investigation of an assault was not the equivalent of an arrest for purposes of the constitutional right to a speedy trial.

[4] See, *e.g.*, Mills & Pierce Br. in Opp. 14-15; Reynoso Br. in Opp. 12-13, 16.

impaired by their administrative detention. See Pet. App. 20a-23a. In our view, the decisions of this Court require more. In *United States* v. *Morrison*, 449 U.S. 361, 365 (1981), the Court stated that dismissal of the indictment would be a "plainly inappropriate" remedy in a right to counsel case "absent demonstrable prejudice, or substantial threat thereof." That standard must call for more than a claim that the alleged constitutional violation may have resulted in an inability to locate a few potential witnesses. At the very least, the court should have evaluated what the missing witnesses would have added to respondents' defense, in view of the evidence that respondents in fact were able to produce (*e.g.*, the testimony of the 42 witnesses, including six alibi witnesses, that respondents Mills and Pierce presented at their trial).[9] The court below did not conduct such an analysis, as evidenced by its reliance (Pet. App. 20a-21a) on the pretrial conclusions of the district court that dis-

[9] As we pointed out in our petition (at 22-26), a court also should consider various other factors, including whether a defendant remained in the general prison population during some part of the preindictment period, whether and how a defendant's preparation has been aided by access to FBI reports and various prison records, the fact that a defendant has access to a prison staff representative in connection with presentation of his case in a prison disciplinary proceeding, whether jury instructions could cure certain problems, the fact that any party to a criminal proceeding is unlikely to experience ideal conditions in preparation of a case, and so on. We note that several respondents inaccurately describe the staff representatives made available to inmates as prison guards. See Ramirez Br. in Opp. 8 n.1; Mills & Pierce Br. in Opp. 18. The Bureau of Prisons informs us that the staff representative may well be, *e.g.*, a social worker or counselor. In any event, it is the inmate who selects the staff representative. See 28 C.F.R. 541.14(b).

missed the indictments of Mills and Pierce for its conclusion that all respondents must have been deprived of a fair trial as a result of their stay in administrative detention.

4. Respondents suggest that the decision below is a narrow one that will have no major effects on the federal prison system. That suggestion cannot withstand scrutiny. Respondents opine that only a "narrow" class of inmates—those who are indigent, who request attorneys, who are unrepresented, who are held for "pretrial detention purposes," who are held over 90 days, and who are prejudiced by detention—will be affected by this decision. Reynoso Br. in Opp. 18; Mills & Pierce Br. in Opp. 22. But that class is not a narrow one. Respondents themselves recognize that many inmates who commit prison crimes are indigent and unrepresented. See Mills & Pierce Br. in Opp. 18 n.*. Presumably a large number of these inmates request attorneys at some point. All six respondents in this case claim to have done so. Even if some inmates would not request counsel on their own initiative, the court below presumably would conclude that inmates must be informed of the right to counsel.[10] Most inmates held in administrative detention pending a criminal investigation will be there at

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[10] In *United States* v. *Wagner*, No. CR 83-125-RMT (C.D. Cal. Aug. 1, 1983), the district court dismissed yet another prison murder charge, in reliance upon the decision here. It found that the defendant had requested counsel within the meaning of the decision below, despite the fact that (following his initial request for counsel after he was placed in administrative detention and advice from prison officials that it was up to inmates to contact counsel) he never informed prison authorities that the Federal Public Defender's office had declined to assist him because he had not yet been formally charged.

least in part because of the existence of the ongoing investigation (and the security and safety concerns associated therewith). Because of the investigative difficulties the government faces in connection with prison crimes, it is not likely that indictments will be brought within 90 days of a suspect's placement in administrative detention in most cases. Finally, the minimal showing of prejudice required by the court below ensures that few inmates will be screened out on the basis of that factor.

Respondents Mills and Pierce assert that federal prison officials in fact have adopted procedures for appointment of counsel similar to those required by the decision below and that such procedures presumably have not created any major problems (Mills & Pierce Br. in Opp. 20). However, Bureau of Prisons officials have informed us that they have not instituted such procedures and that the instances cited by respondents apparently occurred on an ad hoc basis.[11]

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[11] The court of appeals granted a stay of its mandate pending the filing of the government's petition for a writ of certiorari (see Pet. 14 n.8), and the Bureau of Prisons has not attempted to arrange for the provision of counsel while this case remains in litigation. Nor are we aware of any cases in which a court has appointed counsel prior to indictment pursuant to the provisions of the Criminal Justice Act as a result of this case. The Bureau has learned that in one instance a Bureau employee at Lompoc, at the behest of an FBI agent conducting an investigation of a prison murder there, contacted the Federal Public Defender's office to arrange for representation of a suspect in administrative detention. However, that action was not taken in connection with any official Bureau policy.

We note that respondents Mills and Pierce state that prison officials prohibited them from discussing their case with anyone other than prison or FBI investigators. Mills & Pierce Br. in Opp. 3. However, as the court of appeals recognized, re-

So far as we have been able to discover, nothing in the experience of the Bureau of Prisons calls into question our initial evaluation of the practical consequences of the decision below.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
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spondents apparently could have made unmonitored telephone calls to an attorney if they had sought to do so and were not deprived of visitation rights. See Pet. App. 6a.

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